IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1942

No.....

MARTIN BROTHERS BOX COMPANY,
*Petitioner and Respondent Below*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent and Petitioner Below*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I.

### OPINIONS BELOW

The opinion rendered herein by the United States Circuit Court of Appeals for the Seventh Circuit, was filed on June 23, 1942, and appears in the Record, pp. 565 to 575 *et seq.*, it is to date unreported.

### II.

### JURISDICTION

1. The date of the judgment, order and decree to be reviewed is July 14, 1942, (Record, p. 575).

2. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240, as last amended by Act of Congress approved June 7, 1934, C. 426, 48 Stat. 926 (Title 28, Sec. 347(a) U. S. C. A.)

3. The cases believed to sustain the jurisdiction of

this court are as follows: *National Labor Relations Board vs. Link-Belt Company,* 311 U. S. 584; *National Labor Relations Board vs. Virginia Electric & Power Company,* 314 U. S. 469; *Consolidated Edison Company vs. National Labor Relations Board,* 305 U. S. 197; *National Labor Relations Board vs. Jones & Laughlin Steel Corporation,* 301 U. S. 1; *National Labor Relations Board vs. Air Associates, Inc.,* 121 Fed. (2d) 586; *H. J. Heinz Company vs. National Labor Relations Board,* 311 U. S. 514 and *National Labor Relations Board vs. P. Lorillard Company,* 117 Fed. (2d) 921.

## III.

## STATEMENT OF THE CASE

The manner in which this cause comes before this court has previously been stated in the petition for writ of *certiorari* to which this brief is attached under heading No. I. "Summary Statement of the Matter Involved," which is hereby adopted and made a part of this brief.

In addition to the matter stated in the matter heretofore stated, counsel for petitioner wish to call this court's attention to the following facts.

Petitioner, through its officers, first learned of the desire of its employees to organize for the purpose of collective bargaining late in 1937, or early in 1938 (Record, pp. 85, 118, 352). On July 22, 1938, petitioner clarified its attitude toward the organization efforts of its employees by posting a letter to all employees on the bulletin board at its Aurora plant (Record, pp. 52, 86, 122, 352; Board's Exhibit 3).

Petitioner learned of the completion of the organization of the Union on receipt of a letter from the financial secretary of the Union dated August 25, 1938 (Record, pp.

353, 553). On September 6, 1938, petitioner indicated its complete willingness to meet with the Union representatives for the purpose of collective bargaining in a letter to the financial secretary of the Union (Record, pp, 353, 554).

Various meetings were held between the representatives of the Union and the officers of petitioner, which resulted in the signing of a written contract between petitioner and the Union under date of November 18, 1938 (Record, pp. 88, 89, 90, 91, 92, 355, 356, 457, Board's Exhibit 8). The contract was then signed and accepted by the president of the International Printing Pressmen and Assistants Union of North America on behalf of said International with which the local Union was then affiliated (Record, p. 94, Board's Exhibit 8).

Thereafter, during the winter of 1938 and the spring and early summer of 1939, relations between petitioner and its employees were governed by this written contract. The customary grievances which arise in plant operations were presented to the petitioner by the duly elected Grievance Committee of the Union. Pursuant to the contract these grievances were adjusted and settled (Record, pp. 94, 95, 96, 128, 136, 359, Board's Exhibits 10a to n, inclusive).

In the early part of August, 1939, a complaint of the die press operators, concerning the change in the setup time on the die presses was brought to the attention of petitioner through the Union Grievance Committee (Record, pp. 417 to 422; 556 to 558). Petitioner's Aurora plant manager, McIntyre, met with the Grievance Committee on two occasions (Record, pp. 359, 421) and the complaint was settled to everyone's satisfaction (Record, p. 422). Arbitration was never requested (Record, pp. 408, 422). However, prior to the settlement of this grievance on August 25, 1939, McDaniel, then president of the Union, sent a letter to Selz, international representative of the Printers and Pressmens Union, with offices in Cincinnati,

Ohio, (Record, pp. 58 and 59, Board's Exhibit 12). A copy of this letter was delivered by McDaniel to Stark, petitioner's Aurora plant superintendent (Record, p 96) with the request that the same be transmitted to petitioner's president personally (Record, p. 400). This was done (Record, p. 400). On August 30, 1939, Martin, petitioner's president, personally discharged McDaniel for writing this letter (Record, p. 363). The writing and transmission of this letter were the individual acts of McDaniel, not known or sanctioned by the Union or any of its individual members (Record, p. 140).

On September 2, 1939, an employee, Charles Clifford Huff, was given his discharge (Record, pp. 435, 451). On several occasions Huff had requested a letter of recommendation for another job which he thought he could get and which evidently was a better job and paid more money (Record, p. 434). At the time Huff was given his discharge, he was also given a letter of recommendation (Record, pp. 435, 559, Board's Exhibit 20).

By letter, dated September 6, 1939, petitioner was notified by the Union of its desire to negotiate a new contract (Record, pp. 365, 461, Board's Exhibit 29b). Negotiations were thereafter entered into between the officers of petitioner and the Union representatives (Record, pp. 422, 423). While Mr. Fred J. Martin, Jr., petitioner's president, himself did not attend these meetings, he had given McIntyre full authority to negotiate with respect to every provision of the proposed new contract except the wage provision (Record, p. 422). By November 30, 1939, all points at issue between the petitioner and the Union had been settled with the exception of the wage scale (Record, pp. 270, 271). Martin had informed petitioner's officers at Aurora that he personally wished to negotiate the wage provision. A shortage in liner board in this country required Martin to spend all of his time traveling through

the country in an effort to purchase enough liner board to keep the plant running (Record, pp. 366, 367). Martin was thus unable to be at Aurora for the time required to negotiate on the wage provision prior to November 30, 1939, and the Union representatives were aware of this fact (Record, p. 490, Petitioner's Exhibit 1). Realizing the desire of the Union representatives to conclude negotiations on the contract, including the wage provision, Martin, as early as November 18, 1939, wrote a letter to Autterson, the representative of the Union, (Record, p. 491, Petitioner's Exhibit 3) in which he stated that any decision finally agreed upon as to the wage scale would be retroactive to October 15, 1939 (Record, pp. 274, 275, 491).

In the latter part of November, 1939, Martin made a definite appointment with Autterson to meet with the Union Committee and representatives December 5, 1939, at Cincinnati, Ohio (Record, pp. 369, 370), for the purpose of completing the negotiations and reaching an agreement on the wage scale (Record, pp. 369, 370). The time and place for this meeting were agreeable to all parties and Autterson posted a notice of the time and place of this meeting in the plant on November 29, 1939 (Record, pp. 268, 269, 560, Petitioner's Exhibit 2). Despite the foregoing, the Union voted to strike November 30, 1939 (Record, p. 268, and on the morning of December 1, 1939, petitioner's plant employees failed to report for work (Record, pp. 268, 425). This strike continued from December 1, 1939, to January 2, 1940. The December 5 meeting was never held because of the strike (Record, pp. 370, 371, 372, Board's Exhibit 35).

During the time of the strike meetings were held between representatives of petitioner and Union representatives in the Cincinnati office of Mr. Addicks, a conciliator of the United States Department of Labor on December

12th, 18th, 20th or 21st, and December 28th (Record, pp. 378 to 383, 428 to 446).

At the December 12, 1939, meeting an agreement was reached which was agreed to by petitioner and the authorized representatives of the Union, and the latter agreed to take it back to the Union for confirmation (Record, pp. 321, 374, 427). The Union Committee submitted this agreement to the Union membership for confirmation on December 12, 1939 (Record, p. 428), but the Union membership refused to confirm the same (Record, pp. 321, 374, 428).

The next meeting was held either the 18th, 20th or 21st of December, 1939 (Record, pp. 375, 428) also in Mr. Addicks' office in Cincinnati. Petitioner's representatives were present along with the Union Committee, and a Mr. Ten Eyck, the Union's international representative, who assured Addicks that the Union Committee and representatives this time had authority to enter into a final agreement (Record, pp. 376, 428, 429). Again, an agreement was reached, which was reduced to writing, signed by petitioner's president and submitted to the Union (Record, pp. 429, 475 to 480, Board's Exhibits 41a, 41b). This agreement was likewise rejected (Record, pp. 379, 432), even after petitioner, at the request of Addicks, made preparation to reopen its Aurora plant (Record, pp. 377 to 379; 429 to 431).

On December 28, 1939, still another meeting was held in Addicks' office in Cincinnati, attended by petitioner's representatives, the Union Committee and both Ten Eyck and Autterson (Record, pp. 323, 377, 434). Again, an agreement was arrived at, which was acceptable to the petitioner and the Union Committee (Record, pp. 324, 377, 436). The Union rejected this agreement at a Union meeting held on December 29, 1939 (Record, pp. 329, 379, 439). When informed of this by McIntyre (Record, p. 439)

Martin took the position that he would not now sign another contract with the Union (Record, pp. 381, 439, 440).

On January 2, 1940, a voluntary attempt was made by a number of petitioner's employees to return to work (Record, pp. 441, 442). No claim is made that petitioner was in any way responsible for this (Record, p. 1, Board's Exhibit 1-E). Autterson communicated this fact to Martin by telephone (Record, pp. 380, 381). At a meeting held on the afternoon of January 2, 1940, petitioner's employees voted to return to work (Record, p. 331) and did so (Record, p. 444). Since this time petitioner has constantly taken the position that it would at all times negotiate with the duly authorized representatives of its employees (Record, pp. 385, 386). To date of the filing of this complaint such negotiations had resulted in settling all matters except the wage scale.

## IV.

## SPECIFICATIONS OF ERROR

1. Said the Circuit Court of Appeals erred in holding that the Board's finding that petitioner has interfered with the rights of self-organization of its employees in violation of Section 8(1) of the Act was supported by substantial evidence and in ordering petitioner to cease and desist from such alleged interference.

2. Said Circuit Court of Appeals erred in holding that the Board's finding that petitioner in terminating the employment of its employees, McDaniel and Huff, had discriminated against said employees in violation of Section 8(3) of the Act was supported by substantial evidence and in ordering the reinstatement of said employees and the payment to them of back pay.

3. Said Court of Appeals erred in holding that the finding of the Board that petitioner had not bargained

collectively with the duly constituted representative of its employees, the Union, within the meaning of Section 8(5) of the Act, was supported by substantial evidence and in ordering petitioner to bargain collectively with the Union as the sole representative of petitioner's non-clerical and non-supervisory employees.

## V.

## ARGUMENT

**Point 1. The Finding of the Board that Petitioner Has Interfered with the Rights of Self-Organization of Its Employees in Violation of Section 8(1) of the Act Is Not Supported by Substantial Evidence.**

The Board's complaint in Specification 6 (Record, p. 2) alleges in substance that petitioner since July 1, 1938, to the time of the filing of the complaint September 23, 1940, has interfered with employees' right of self-organization, and the Circuit Court has held that this allegation is supported by substantial evidence. It is submitted that this holding is in error.

The fundamental right of organization on the part of employees is recognized. *National Labor Relations Board vs. Ford Motor Co.*, 114 Fed. (2d) 905. It is likewise recognized that there must be no interference with this fundamental right, but that there must be complete freedom of choice on the part of the employees. *National Labor Relations Board vs. Jones & Laughlin Steel Corporation*, 301 U. S. 33; *H. J. Heinz Company vs. National Labor Relations Board*, 311 U. S. 514; *National Labor Relations Board vs. Link-Belt Company*, 311 U. S. 584.

From the standpoint of the employer, however, his fundamental right of freedom of expression remains unabridged and unimpaired. *National Labor Relations Board vs. Virginia Electric & Power Company*, 314 U. S. 469;

*National Labor Relations Board vs. Ford Motor Company,* 114 Fed. (2d) 905.

The burden is on the Board to show that the employer has exceeded his constitutional right of freedom of expression and has interfered with his employees' rights of self-organization, and this must be shown by substantial evidence and not mere uncorroborated hearsay or rumor. *Consolidated Edison Company vs. National Labor Relations Board,* 305 U. S. 197.

Petitioner, upon first learning of its employees' desire to organize sometime during the Fall of 1937 and the early part of 1938, felt that there was some doubt in its employees' minds as to the petitioner's attitude. Accordingly Mr. Fred J. Martin, Jr., petitioner's president, on July 22, 1938, posted a letter on its bulletin board signed by Mr. Martin setting forth petitioner's views on the question of the organizational efforts of its employees.[1] (Record, p. 52).

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[1](Letterhead of The Martin Brothers Box Co., Toledo, Ohio)

July 22, 1938.

To All Employees:

It is our understanding that the employees at the Aurora plant have been approached by union organizers with a view toward organizing the plant.

Under the Wagner Act, the employees have the right to organize and bargain collectively with the employer. The management of this company has no objection to the employees organizing, nor can the management either approve or disapprove their doing so. A neutral course must be pursued, and we do not intend either to hinder or encourage your actions, whatever they may be.

Our only suggestion is that if you should decide to organize, that it should be as near 100% as possible. The old saying is that "United we stand, divided we fall," and it certainly would be desirable that the matter be considered with an open mind by all employees, and the decision be one that will reflect the views of the majority.

The most disheartening thing that has occurred in conjunction with organizations in plants throughout the nation has been the splitting of the employees into individual factions, with resultant strife, to the detriment of both employer and employees.

If a minority of employees should organize, they could hardly be recognized as the sole collective bargaining agency for the employees. In such cases there are always controversies, through no fault of the employer. Therefore, consider the matter fairly, and choose what you think is the proper course. We will in no way interfere. We do not mind saying that if we have a labor organization at Aurora, we would like to see it 100%.

(Signed) F. J. Martin, Jr.

FJMartinJr/C

President.

It is submitted that petitioner was clearly within its rights in preparing this letter and in posting it on its bulletin board. *National Labor Relations Board vs. Virginia Electric & Power Company,* 314 U. S. 469.

The organization of the Union was completed in July of 1938 and petitioner was then notified. (Record, pp. 353, 553; Board's Exhibit 4). There is absolutely no evidence in the record that petitioner had anything whatsoever to do with the organization of the Union; that it in any way contributed to its financial support; that it in any way attempted to dictate to the Union, its International affiliation; that it in any way influenced the choosing of the officers of the Union; or that it in any way urged its employees either to become or not to become affiliated with the Union.

On November 18, 1938, petitioner called a mass meeting of its employees (Record, pp. 92, 93, 356, 357). The Board and the Circuit Court found that the calling of this mass meeting and the action taken thereat constituted an interference with the rights of self-organization of petitioner's employees. There is no evidence that at this meeting petitioner's president, Mr. Martin, who spoke at the meeting, in any way criticized the activities of the Union bargaining committee, thereby interfering with the self-organizational rights of petitioner's employees.

After this meeting, a meeting of the Union members was held and a contract signed. (Record, p. 457, Board's Exhibit 8.) This contract was sent by the Union to the International office in Tennessee, was countersigned by the International president and transmitted by the Union to petitioner under date of December 10, 1938. During the period from November 18, 1938, to December 10, 1938, there is no evidence that any claim was made that the contract was not freely entered into.

In the Circuit Court the Board made the contention that the contract itself, by reason of a no strike clause and wage scale agreement, restrained and interfered with the employees' organizational rights by requiring them not to request or strike for a wage increase. The fact is, that no wage scale agreement appears in the contract. The only reference to wages in the contract appears in the next to the last paragraph thereof, Section 15 (Record, p 460), which states: "The minimum scale of wages shall be as have been in effect to the date of entering into this agreement."

There is no provision in the contract preventing the employees from asking for a wage increase.

The Board likewise criticizes the contract because of the closed shop provision. This clearly was put in for the benefit of the Union.

The Board likewise criticizes the "no strike" clause. (Record, p. 457). This likewise was included for the benefit of the Union since it states in effect that the employer agrees not to lock out the Union during the terms of this agreement and by the same token the Union agrees that it will not call any strike.

The further significant fact which indicates that this contract was in no way coercively entered into is the undisputed fact that under the terms of the contract the relationship between petitioner and the Union remained friendly and satisfactory for nearly a year. The Union's existence did not cease after the contract was entered into, but continued for more than a year thereafter.

It is submitted that there is no substantial evidence to sustain the Board's finding that petitioner in any way interfered with its employees' rights of self-organization.

**Point 2. The Finding of the Board that Petitioner, in Terminating the Employment of Its Employees, McDaniel and Huff, Discriminated Against Said Employees in Violation of Section 8(3) of the Act Is Not Supported by Substantial Evidence.**

Section 8(3) of the Act in substance makes it an unfair labor practice for an employer to discharge or otherwise to discriminate as to the hiring of an employee in order to encourage or discourage membership in any labor organization. In its complaint, Specifications 9, 10 and 11, (Record 4) the Board has in substance charged that petitioner violated Section 8(3) of the Act by discharging two of its employees, Alvin McDaniel and Charles Clifford Huff, and refusing to reinstate them. The Board in its order, and the Circuit Court in its decree, have ordered petitioner to reinstate these employees and to pay to each of them a sum of money equal to that which each would normally have earned during the period of the discharge less his net earnings during that period. (Record 80.)

The courts have clearly recognized the right of an employer to discharge an employee. In the case of *National Relations Board vs. Jones & Laughlin Steel Company*, 301 U. S. 1, this court stated on Pages 45 and 46 of its decision:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

As is true with all other findings of the Board, the burden of proof is on the Board to show that its finding of a discrimination violative of Section 8(3) of the Act is sustained by circumstantial evidence. *Consolidated Edison Company vs. National Labor Relations Board,* 305 U. S. 197; *American Smelting & Refining Company vs. National Labor Relations Board,* 126 Fed. (2d) 680.

It has also been recognized that orders for reinstatement of employees with back pay differ from the other orders which the Board may validly make under the Act in the degree of proof necessary to sustain such reinstatement and back pay orders. *National Labor Relations Board vs. Tex-O-Kan Flour Mill Company,* 122 Fed. (2d) 433. This distinction is based upon the fact that such back pay orders "may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law." *National Labor Relations Board vs. Tex-O-Kan Flour Mill,* 122 Fed. (2d) 433. It has likewise been held that there must be substantial evidence not only that the purpose of the discharge was to discriminate against Union membership, but also that the unlawful purpose of discrimination had the desired effect, *viz.*: the discouragement of Union membership. *National Labor Relations Board vs. Air Associates Inc.,* 121 Fed. (2d) 586. In this case the court stated, on page 592 of its opinion:

> "(13). In ordering the reinstatement of Rodolitz and Geoghegan, however, the Board acted on insufficient findings. The Board found that these men were discharged in order to create resentment against the Union and to counteract the effect of the Union's success in securing the reinstatement of four shop committeemen, who had been discharged by respondent. Section 8(3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging Union mem-

bership. The Board made a clear finding that the purpose of the discharges was to discourage membership in the Union, and we think that finding was sufficiently supported by evidence to the effect that (1) the discharges, which preceded the reinstatement of the committeemen by one day, were not in fact necessary, and (2) anti-Union statements were made to the two men at the time of their discharges. But we can discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had the effect required by the Act, or findings from which such an effect might reasonably be inferred. The reinstatement order is modified, therefore, to omit Rodolitz and Geoghegan."

The discharge of two employees, Alvin McDaniel and Charles Clifford Huff, is the basis of the charge by the Board that petitioner has violated Section 8(3) of the Act. Counsel for petitioner will discuss the discharge of these two employees separately.

## A. ALVIN MCDANIEL

This employee had been active in the Union since its formation and had acted for some time as president of the Union. As president, he was a member of the grievance committee which had presented a number of formal written complaints to the management (Board's Exhibits 10a to 10m, inclusive). All of these grievances had been settled in a friendly manner and in addition to the formal grievances, this employee had on many occasions taken up minor grievances directly with Mr. Stark, a supervisory employee of petitioner (Record, pp. 135, 136). The testimony of all witnesses who testified on the subject was the same, *i.e.*, that there was no dissatisfaction as to the operation of the grievance committee or the attitude of petitioner toward it or toward its members.

In the early part of 1939 a complaint arose regarding the setup time of the die operators. This complaint involved the work of but two employees (Record, pp. 141, 142) and McDaniel himself stated that he was not familiar with the circumstances surrounding the complaint and the operations involved. (Record, p. 142.) At the hearing held before the trial examiner, the regional attorney for the Board specifically stated that this grievance and the action of petitioner with respect thereto did not constitute a refusal to bargain collectively on the part of petitioner.

McDaniel, not being satisfied with petitioner's attitude with respect to this complaint, on August 25, 1939, wrote a letter to Mr. William Selz, Cincinnati, Ohio, one of the International representatives of the Union, expressing his dissatisfaction. (Record, pp. 58, 59, Board's Exhibit 12.) This letter was a personal action of Mr. McDaniel in that it was never authorized by the Union, (Record, pp. 138, 140), was never discussed at a Union meeting (Record, p. 173), and was in fact not known to the Union members (Record, p. 140). This letter was impertinent, unauthorized and unwarranted, and because of it, McDaniel was discharged (Record, pp. 101, 363, 364). In discharging this employee for writing this letter, petitioner was clearly justified. Southport Petroleum Company, Etc., 8 National Labor Relations Board Reports 792. In this case, with respect to the discharge of this employee, we have positive sworn evidence by Fred J. Martin, Jr., petitioner's president, that he discharged this employee for writing this letter (Record, pp. 363, 364), and the Board and the Circuit Court erred in disregarding this positive sworn evidence. *National Labor Relations Board vs. Tex-O-Kan Flour Mill Company,* 122 Fed. (2nd) 433.

## B. CHARLES CLIFFORD HUFF

With respect to this employee, we, likewise, have positive sworn evidence as to the reason for his being discharged. Mr. McIntyre, petitioner's plant superintendent, in charge of production, personally discharged this employee after having been informed that Huff was seeking work elsewhere (Record, p. 434). This was stated fully to a Mr. Ten Eyck, International representative, at a meeting held on December 28 at the office of Mr. Addicks of Cincinnati, and subsequent thereto, Mr. Ten Eyck stated that he "could not see any reason for us considering Huff further in the negotiations" (Record, p. 438).

While Huff was a charter member of the Union, he was not particularly active in the Union until after his discharge (Record, p. 171). The Board has found Huff was discharged because of his friendship and sympathy for McDaniel, but there is no evidence in the record that Huff was in any way friendly with McDaniel.

In support of its finding with respect to this employee, the Board relies on certain statements allegedly made by a Mr. Dodge who was at one time a supervisory employee of petitioner and claims that these alleged statements are binding upon petitioner. It is a fundamental principle of general law, so well established that no authority for it need be cited, that statements of an agent in order to be binding upon a principle must be made within the course of the agent's employment. It is likewise well settled that statements of a supervisory employee, in order to be binding upon the employee, must have been made either with express authority, or in the usual course of the supervisory employees' employment, or that such statements be not disavowed when they become known to the employer. *National Labor Relations Board vs. Tex-O-Kan Flour Mill Company,* 122 Fed. (2d) 433. None of these facts appears in the rec-

ord in this matter. There is no basis for any finding that petitioner is in any way responsible for or bound by the statements allegedly made to Huff by Dodge. The fact is, as Huff testified, that petitioner did not know what statements had been made and did not know who had made them. (Record, p. 182.)

There is no substantial evidence to sustain the Board's finding with respect to this employee that he was discharged in violation of Section 8(3) of the Act.

## C. THE DISCHARGE OF THE EMPLOYEES MCDANIEL AND HUFF DID NOT DISCOURAGE MEMBERSHIP IN THE UNION.

The finding and decree of the Seventh Circuit Court of Appeals in this case with respect to the discharge of the employees, McDaniel and Huff, is squarely in conflict and contrary to the decision of the Circuit Court of Appeals for the Second Circuit in the case of *National Labor Relations Board vs. Air Associates, Inc.,* 121 Fed. 2d, 586. That case specifically held that before the Board was justified in finding a violation of Section 8(3) of the Act, there must be substantial evidence not only that the employees had been discharged because of their Union activities but also that such discharge had had the effect of discouraging Union membership. There is absolutely no evidence that the discharge of these employees had any effect either upon the Union membership or upon the Union itself. It was only a week after McDaniel was discharged and but a few days after Huff was discharged that petitioner was notified by the Union of its desire to negotiate a new contract. (Record, p. 365; Board's Exhibit 29b). McDaniel continued to be active in the Union. He testified that there was a Union meeting on the evening of the day that he had been discharged and that at this meeting his resignation was not

requested and although offered was not accepted. (Record, p. 103.) Huff became active in the Union after he was discharged. (Record, p. 171.)

The finding of the Board and the order of the Circuit Court of Appeals for the Seventh Circuit that petitioner violated Section 8(3) of the Act in discharging these employees is not sustained by substantial evidence in that there is no evidence that these men were discharged because of their Union activities and in that there is no evidence that the discharge of these employes had any effect whatsoever on the Union. In the latter respect the decision of that court is contrary to the holding in *National Labor Relations Board vs. Air Associates, Inc.,* 121 Fed. (2d) 586. previously referred to.

**Point 3. The Finding of the Board that Petitioner Has Failed to Bargain Collectively with Its Employees Within the Meaning of Section 8(5) of the Act Is Not Supported by Substantial Evidence.**

An examination of the complaint filed by the Board in these proceedings (Record, p. 1, Bd's Ex. 1-E) as amended (Record, p. 81) indicates that it was not alleged that petitioner had in any way refused to bargain collectively with its employees prior to October 15, 1939. The trial examiner in his intermediate report specifically found that there had been no failure or refusal by petitioner to bargain collectively with its employees prior to October 15, 1939. (Record, p. 35, 38.) Likewise, the Board, in its decision and order specifically found that there had been no failure or refusal by petitioner to bargain collectively with its employees prior to said date of October 15, 1939. In view of the foregoing, it is clear that any evidence of a refusal to bargain collectively before October 15, 1939, is irrelevant and has no bearing upon any alleged violation of Section

8(1) and Section 8(5) of the Act.[2] Any alleged violation of Section 8(1) of the Act prior to October 15, 1939, must be sustained solely by circumstantial evidence of interference by petitioner with its employees' rights of self-organization as distinguished from evidence of a refusal to bargain collectively.

In its argument in the Circuit Court of Appeals and in its brief in support of its contention that petitioner had refused to bargain collectively with its employees, the Board set forth at considerable length evidence relating to the dealings between petitioner and its employees for over a year prior to October 15, 1939. It is submitted that under the pleadings and in view of the findings of the trial examiner and the Board, such evidence is wholly irrelevant on this point.

The duty of collective bargaining, as set forth in the Act, contemplates a meeting or meetings between the employer and the duly accredited representatives of its employees with a view to negotiating for a collective agreement between said parties which will stabilize employment relations for a period of time. It is not mandatory that an agreement between the employer and employees be reached. *National Labor Relations Board vs. Jones & Laughlin Steel Company,* 301 U. S. 1. On page 45 of the decision in this case, this court stated:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever.* * * The theory of the Act is that free opportunity for negotiation with accredited

[2]"Sec. 8. It shall be an unfair labor practice for an employer—
"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."
"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

> representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."

The Act does contemplate that an honest effort shall be made, looking to the entering into of such collective agreements. *Consolidated Edison Company vs. National Labor Relations Board,* 305 U. S. 197.

This provision of the Act has likewise been construed as holding that once a verbal agreement is reached on all points covered by the negotiations, such an agreement is to be reduced to writing and signed by the parties thereto. *H. J. Heinz Company vs. National Labor Relations Board,* 311 U. S. 514. Such an agreement need not be put in writing or signed, however, until complete agreement on all points under discussion is reached.

The collective bargaining provision in the Act does not define what agreement shall be proposed by the employer or by the Union representatives in their negotiations, and it does not prevent the employer either from refusing to enter into such a contract or to state frankly the terms upon which he will yield, and those upon which he will not yield. *National Labor Relations Board vs. P. Lorillard Company,* 117 Fed. (2d) 921; *National Labor Relations Board vs. Ford Motor Company,* 114 Fed. (2d) 905.

The fundamental essential so far as the employer is concerned is his good faith in negotiating with the representatives of his employees, and in order for the Board to find that there has been a failure on the part of petitioner to bargain collectively with its employees, the Board must necessarily find a lack of good faith on the part of petitioner, and this finding must be sustained by substantial evidence, and not mere uncorroborated hearsay or rumor. *Consolidated Edison Company vs. National Labor Relations Board,* 305 U. S. 197.

It is to be borne in mind, as hereinbefore stated, that there is no allegation in the complaint nor any finding by the trial examiner over the Board that petitioner in any way refused to bargain collectively with its employees prior to October 15, 1939. This date of October 15, 1939, seems to have been used because all parties agreed that the 1938 contract (Record, p. 457, Board's Exhibit 8) expired on that date.

The nature of petitioner's business in its Aurora plant, the manufacturing of corrugated boxes, required the assurance of a supply of raw material. This raw material is known as "liner board" and is made by the processing of various types of lumber, much of which had been imported from Norway, Sweden, Denmark and Finland (Record, p. 366). The commencement of hostilities in Europe in the Fall of 1939 immediately greatly reduced imports of lumber from the Scandinavian countries (Record, p. 366). Mr. Martin, petitioner's president, accordingly found it necessary to devote practically all of his time in attempting to obtain liner board from domestic sources to replace that which had formerly been received from abroad. This was recognized by Mr. Autterson, who at that time was in charge of negotiations on behalf of the Union (Record, p. 490, petitioner's Exhibit 1).

Accordingly, petitioner's plant superintendent at Aurora, Mr. McIntyre, was authorized to continue the negotiations with the Union and was vested with final authority as to all points at issue with the exception of the wage scale which Mr. Martin desired to negotiate personally. (Record, p. 256.) Mr. McIntyre's authority was co-extensive, if not greater, than the authority vested in the Union negotiating committee (Record, pp. 256, 257), and numerous meetings were held during October and November, 1939, between the Union representatives and Mr. McIntyre, and

all of the details of the contract were worked out with the exception of the wage scale.

On November 17, 1939, Mr. Autterson wrote a letter to Mr. Martin regarding the wage scale to be included in the new contract (Record, p. 490, Petitioner's Exhibit 1), and on the following day Mr. Martin replied to this letter (Record, p. 491, Petitioner's Exhibit 3). In his reply Mr. Martin stated, with reference to the wage scale "whatever is eventually agreed upon will be retroactive to the expiration date of the old contract." Shortly after writing this letter, Mr. Martin made a definite appointment with Mr. Autterson to meet him at 10 o'clock on Tuesday, December 5, and notice of this appointment was given by Autterson to petitioner's employees by posting a "special notice" on the bulletin board at petitioner's plant (Record, p. 560, Petitioner's Exhibit 2). Despite the fact that the new contract had been settled with the exception of the wage scale, despite the fact that petitioner had agreed that the new wage scale should be retroactive to the date of the old contract, and despite the fact that petitioner's president had a definite appointment to meet with the Union representaives on December 5, the employees struck the plant and failed to report for work on the morning of December 1.

The fact has been recognized that this strike had nothing whatsoever to do with the negotiations for the new contract, and neither the trial examiner nor the Board has found that the strike resulted from any unfair labor practice. The strike was due, as Mr. Autterson himself stated, to the refusal of petitioner to reinstate two employees, a Mrs. Zernak and a Mr. Littell, who had previously been discharged by petitioner (Record, p. 272), and no charge has ever been made that petitioner, in discharging these employees, in any way committed an unfair labor practice.

The strike continued from December 1 to January 3. During the continuance of this strike, petitioner met on at

least three occasions with representatives of the Union in the Cincinnati office of Mr. Addicks, a conciliator of the United States Department of Labor. Cincinnati is but a short distance from Aurora, Indiana, and no claim is made that the Union representatives were in any way inconvenienced by the fact that the meetings were held in Cincinnati. At the first two of these meetings the Union was represented by its bargaining committee and Mr. Ten Eyck. At the third meeting the Union was represented by its bargaining committee, Mr. Ten Eyck and Mr. Autterson.

At the first meeting held on December 12, an agreement was reached between petitioner and the accredited representatives of the Union (Record, pp. 321, 373, 427). The agreement was rejected by the Union membership (Record, pp. 321, 374, 428). At the second meeting, due to the rejection of the previous agreement, Mr. Addicks personally secured assurance that the committee was fully authorized and had full power to act for the Union. (Record, p. 429.) At the beginning of this second meeting, Mr. Addicks stated that the committee "now had full power to act for the Corrugated Box Workers Union," and this statement was confirmed by Mr. Ten Eyck (Record, p. 429). A second agreement was thereupon proposed and accepted by petitioner and the Union representatives, signed by petitioner's president, and taken by the Union representatives to Aurora for execution by the officers of the local (Record, p. 476, Board's Exhibit 41b). Despite this understanding not only with petitioner but also with Mr. Addicks, the government representative, this second agreement was likewise rejected by the Union membership, even after petitioner at the request of Mr. Addicks made preparation to reopen its Aurora plant (Record, pp. 377 to 379; 429 to 431).

Despite this obvious lack of good faith on the part of the Union, petitioner attended a third meeting with the Union representatives at Mr. Addicks' office on December

28. At this meeting a third agreement was submitted and agreed upon by all parties (Record, pp. 324, 377, 436). This agreement was likewise rejected by the Union membership at a meeting held on the evening of December 29 (Record, pp. 329, 379, 439).

Petitioner's employees voluntarily returned to their employment on the morning of January 3 and no contention has been made or, indeed, could be made that petitioner in any way influenced its employees' decision in this matter.

Since January 3, 1940, there has been in fact no Union in existence (Record, pp. 152, 153, 184). This Union lost its membership because of the strike in December 1939, which was in no way due to any unfair labor practice (Record, p. 32).

It is submitted that the objective facts as herein set forth show conclusively that petitioner at all times since October 15, 1939, has bargained collectively with the duly accredited representatives of its employees and that the finding of the Board and order of the Circuit Court of Appeals that petitioner has not so bargained collectively are not sustained by circumstantial evidence.

## CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing and reversing the decision herein of the Seventh Circuit Court of Appeals in that said Seventh Circuit Court of Appeals and the Board have not given proper effect to applicable decisions of this court; in that the findings of the Board and the decree and order of said Circuit Court are not sustained by substantial evidence; in that the questions involved herein are of general importance and for the fur-

ther and final reason that the finding and decree of the Board and said United States Circuit Court of Appeals for the Seventh Circuit with regard to the discharge by petitioner of its employees, McDaniel and Huff, are in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *National Labor Relations Board vs. Air Associates, Inc.*, 121 Fed. (2d) 586.

Respectfully submitted,

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